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14 Defendant/Counterclaim-Plaintiff IGT

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 ARISTOCRAT TECHNOLOGIES  
19 AUSTRALIA PTY LIMITED and  
ARISTOCRAT TECHNOLOGIES, INC.,

20 Plaintiffs and Counterclaim-  
21 Defendants,

22 v.

23 INTERNATIONAL GAME  
TECHNOLOGY,

24 Defendant

25 and IGT,

26 Defendant and Counterclaim-Plaintiff.

Case No. C-06-3717-MJJ (JLL)

**MOTION FOR SANCTIONS**

Date: June 13, 2007

Time: 9:30 a.m.

Courtroom F, 15th Floor

Magistrate Judge James L. Larson

**REDACTED VERSION FOR PUBLIC  
FILING**

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PLEASE TAKE NOTICE that on June 13, 2007, at 9:30 a.m., or as soon thereafter as the matter may be heard in Courtroom F, 15th floor of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants International Game Technology and IGT (collectively "IGT") will and hereby do move this Court, pursuant to Fed. R. Civ. P. 30 and 37, the Court's inherent authority and Civil L.R. 37-3 and 7-8, for sanctions against Plaintiffs Aristocrat Technologies Australia Pty. Ltd ("ATA") and Aristocrat Technologies, Inc. ("ATI") (collectively "Aristocrat") for its failure to produce an adequately prepared witness pursuant to Fed. R. Civ. P. 30(b)(6) and for its improper conduct at that 30(b)(6) deposition.

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Declarations of Eric L. Wesenberg and Gabriel M. Ramsey filed concurrently herewith, excerpts of the Rule 30(b)(6) deposition of Aristocrat taken on April 27, 2007, and on such other evidence or argument as may be presented at or before the hearing on this Motion.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. INTRODUCTION**

A key—perhaps dispositive—issue in this case is Aristocrat's knowledge (direct or imputed), conduct and intent regarding its indisputable 2 1/2 year delay in filing a "petition to revive" a patent application declared abandoned by the United States Patent and Trademark Office ("PTO"). In an effort to resurrect the abandoned application, and to account for its non-compliance with applicable filing requirements, Aristocrat's counsel represented to the PTO, on behalf of Aristocrat, that the entire delay was "unintentional." This statement had two consequences. First, it placed in issue Aristocrat's "intent" and "knowledge." Second, it created a conflict with the public record. Indeed, the bare facts available in the patent file history reveal Aristocrat's proclamation of "unintentional" delay to be false.

On September 19, 2006, IGT filed a motion requesting that the Court hold a limited one-day bench trial on the issue of inequitable conduct, in order to address whether Aristocrat falsely represented to the PTO that its entire delay in prosecution was "unintentional." [Ramsey Decl., Ex. C] Aristocrat opposed that motion by arguing that further discovery was needed and that

1 Aristocrat would need to present several fact witnesses regarding its intent. [*Id.*, Ex. D at p. 9]  
2 Aristocrat explicitly noted that IGT would need to depose witnesses on the issue of intent. [*Id.*]  
3 The Court agreed and declined to proceed with an early trial. [*Id.*, Ex. E] The Court also was  
4 disinclined to resolve anticipated but abstract waiver issues, instead indicating that discovery  
5 proceed and that a real record with real questions and honest answers and/or objections be made  
6 so there was a record to work with. [*Id.*, Ex. F]

7 Consistent with this approach, IGT noticed a FRCP 30(b)(6) deposition enumerating a  
8 variety of topics, including the well-anticipated inquiry regarding abandonment of the application  
9 and Aristocrat's intent in delaying its petition to revive. Aristocrat was to prepare its witness to  
10 testify on the noticed topics. The 30(b)(6) deposition of Aristocrat occurred on April 27, 2007.  
11 What ensued can only be described as a charade. Aristocrat's designated witness—a recent hiree  
12 carefully selected to have minimal personal knowledge—was entirely unwilling to provide any  
13 meaningful discovery concerning abandonment, the petition to revive or Aristocrat's "intent,"  
14 despite the fact that Aristocrat claimed that this was necessary discovery only months before.

15 Instead, Aristocrat's counsel took a series of inexcusable and outrageous positions  
16 calculated to obstruct and prevent the discovery of any meaningful information. Aristocrat's  
17 counsel engaged in serial invocation of utterly unsupportable attorney-client privilege and work  
18 product instructions not to answer. Despite repeated requests by IGT's counsel to discontinue the  
19 practice, Aristocrat's counsel also provided lengthy narrative objections which were  
20 argumentative and obviously designed to coach the witness. Aristocrat's counsel further  
21 proffered objections that find no grounding in the Federal Rules of Evidence or the Federal Rules  
22 of Civil Procedure and on occasion seemed wholly made up. Moreover, the testimony revealed  
23 that the witness was deliberately kept ignorant on relevant topics. Indeed, the witness often  
24 testified contrary to the facts and documents produced in this case. If that weren't enough, hours  
25 before the deposition was scheduled to conclude, Aristocrat's counsel unilaterally and without  
26 justification got up and removed the witness from the deposition. IGT's counsel made repeated  
27 efforts to resume the deposition including describing to Aristocrat's counsel the intended areas of  
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1 examination and additionally invited Aristocrat's counsel to return to place a final statement on  
 2 the record in anticipation of this motion. Aristocrat's counsel refused to make the 30-foot walk  
 3 from the lobby of his law firm to the conference room in order to put the parties' positions on the  
 4 record.

5 Aristocrat should be sanctioned in the sternest of terms for this wantonly disrespectful  
 6 conduct that violated the Rules of Civil Procedure, the Rules of Evidence, the norms and  
 7 standards of discovery in the Northern District of California, the express statements by this Court  
 8 that the parties work in a cooperative manner to resolve their disputes and in defiance of the  
 9 Court's direction that the parties proceed with real discovery, with honest questions and answers,  
 10 so that any dispute regarding privilege can be meaningfully resolved. Aristocrat should be  
 11 required to bear the full cost and fees of this prematurely aborted deposition and IGT's motion to  
 12 compel further testimony plus the other sanctions set forth at the end of this request for its  
 13 reprehensible conduct.

## 14 **II. BACKGROUND AND CIRCUMSTANCES**

15 There can be no substitute for a review of the entire transcript, which IGT attaches as  
 16 Exhibit A to the Declaration of Gabriel M. Ramsey, in order to obtain a comprehensive  
 17 appreciation of Aristocrat's inexcusable conduct during this deposition.<sup>1</sup> However, IGT identifies  
 18 below, by category, exemplars of the type of behavior exhibited by Aristocrat.

### 19 **A. Aristocrat's Counsel Interfered With The Deposition By Improperly Invoking** 20 **The Attorney Client Privilege And Work Product Doctrine**

21 Aristocrat's counsel repeatedly abused the invocation of the attorney client privilege and  
 22 work product doctrine during the deposition.

#### 23 **1. Abuse Of Attorney Client Privilege**

24 Literally, from the very first question of the deposition, to the unilateral termination of the  
 25 deposition, Aristocrat's counsel serially abused assertion of the attorney client privilege followed  
 26 by either an instruction not to answer or rank coaching: The first question of the deposition, and

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27 <sup>1</sup> The video of the deposition is contained on DVDs at Exhibit B to the Ramsey Declaration.  
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1 likely the most anticipated:

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5 [Ramsey Decl., Ex. A at 6:12-18] This was just the beginning.

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11 [*Id.* at 12:12-16] Invocation of the attorney/client communication privilege pervades the  
12 transcript. Remarkably, and tellingly, when the basis of this objection was requested, that too was  
13 declared “privileged.” Aristocrat’s counsel refused to even allow identification of the purported  
14 “attorney” and “client” who participated in the averred privileged communication.

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24 [*Id.* at 38:1-16] It became evident as the deposition progressed that often there was no attorney-  
25 client communication involved, just as there was no work product involved with these objections.  
26 This sort of conduct continued. At one point, when asked whether :

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[*Id.* at 135:5-17; *see also id.* at 133:5-16]

**2. Abuse Of Work Product Doctrine**

A “work product” objection was even more frequently interjected with no foundation whatsoever. During the examination one of the few facts that was ascertained was that Aristocrat

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[*Id.* at 27:13-15]

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1 anything?” [*Id.* at 29:21-22] Aristocrat’s counsel interposed: “Same objection. I’ll instruct you  
2 not to answer.” [*Id.* at 29:23-24] As with the attorney client privilege asserted by Aristocrat,  
3 when IGT’s counsel inquired as to the basis of the invocation of the work product doctrine,  
4 Aristocrat’s counsel treated the very foundational information itself as privileged and both  
5 instructed the witness not to answer and himself refused to provide IGT with the necessary  
6 foundational information to evaluate the propriety, or more likely impropriety, of this invocation.  
7 An example of that is below.

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20 [*Id.* at 116:5-18, 117:1-6] Similarly, at several other points in the deposition, when IGT inquired  
21 as to whether there was any “anticipation of litigation” forming the basis of a work product  
22 objection, Aristocrat’s counsel refused to allow the witness to answer. [*Id.* at 56:4-9; 113:5-  
23 114:24; 116:14-18; 135:1-136:3]

24 **B. Aristocrat’s Counsel Interfered With The Deposition By Giving Instructions**  
25 **Not To Answer With No Identified Grounds**

26 Perhaps the most egregious practice was Aristocrat’s counsel’s repeated instruction to the  
27 witness not to answer, but without any grounds to do so. For example, such an instruction was  
28 given on simple examination about administrative processes for keeping track of patent

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13 [Id. at 14:10-19] Shortly after this exchange was the following:  
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20 [Id. at 16:5-14]

21 Even after the witness had testified using particular terminology, Aristocrat's counsel  
22 refused to allow him to testify what he meant:  
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1 [Id. at 19:21-20:6] IGT's counsel repeatedly attempted to appreciate whether or not Aristocrat  
 2 had certain standard operating procedures or common practices against which IGT would at least  
 3 have established a foundation upon which to examine, explore or challenge what Aristocrat did in  
 4 this particular circumstance. Nervous about what this unprepared witness might say, Aristocrat's  
 5 counsel again would simply instruct the witness not to answer with no identifiable basis

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 [Id. at 19:21-20:2] This happened repeatedly throughout the deposition, preventing meaningful  
 discovery. [See id. at 35:1-23; 139:17-140:5]

C. Aristocrat's Attorney Interfered With The Deposition By Instructing The  
 Witness Not To Answer With Objections That Have No Bases In The Federal  
 Rules Of Evidence Or Federal Rules Of Civil Procedure

On numerous occasions, Aristocrat's counsel simply "made up" objections upon which he  
 instructed the witness not to answer. For example:

1. Perhaps the most bizarre objection declared by Aristocrat's counsel was the instruction  
 to the witness not to answer if in doing so it involved his "mental processes as an attorney at  
 Aristocrat." It is noteworthy that the objection was technically misplaced as Mr. Power has never

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MR. BLANCH: I'm going to instruct you not to answer that question to the extent that  
 you cannot answer without involving your mental processes as an attorney at Aristocrat.  
 If you can do it otherwise – otherwise I will instruct you not to answer.

THE WITNESS: Yeah. No, I won't answer.

1 MR. LOVE: There's no mental process objection to a question in deposition that allows  
2 one to instruct a witness not to answer.

3 MR. BLANCH: That's your position, and I'm not going to debate you. I've given  
4 instruction not to answer, and can go right to the Court.

5 [Id. at 137:25-138: 1-13] So here we are, as Mr. Blanch has requested.

6 Aristocrat's counsel repeated this instruction not to answer based solely on "mental  
7 processes or the thinking of – of Aristocrat personnel . . ." [Id. at 17:3-10; 137:17-138:5 ("mental  
8 processes as an attorney at Aristocrat"); 45:4-9 ("I'm not going to allow you to go – answer any  
9 questions as to your mental processes or things like that"); 140:7-141:15 ("mental process" of "an  
10 Aristocrat legal person.")] This is not a legally cognizable basis to instruct a witness not to  
11 answer.

12 2. On one occasion, Aristocrat's counsel instructed the witness not to answer "because  
13 there's – there are ambiguities in the question." [Id. at 115:8-13]

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[Id. at 15:7-12; 15:24-16:3]

4. Aristocrat's counsel repeatedly invoked an objection to a line of questioning as "just  
basically a memory test." [Id. at 7:24-25; 63:5-7] Suggesting somehow that the witness' memory  
is not a legitimate area of inquiry.

5. Mr. Blanch also repeatedly objected to any inquiry regarding what the witness  
understood the term "hyperlink" to mean, despite the fact that this witness had already taken a  
position on that question. Aristocrat's counsel's effort to instruct the witness not to answer these  
lines of questioning took on incomprehensible characteristics. As demonstrated by the following  
conflated and obscure objection.

MR. BLANCH: Objection. I have to get in here. Objection. Assumes facts  
beyond the scope of the Rule 30(b)(6) deposition topic.

1 [Id. at 109:5-8] None of the foregoing objections are based on the Federal Rules, and alleged  
 2 “ambiguity” is certainly not a basis to instruct the witness not to answer.

3 **D. Aristocrat’s Counsel Interfered With The Deposition By Coaching The**  
 4 **Witness And Other Disruption**

5 Aristocrat’s counsel repeatedly attempted to “coach” the witness and made long speaking  
 6 objections:

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10 [Id. at 6:12-18] This kind of speaking objection occurred repeatedly. [See e.g. id. at 17:3-10;  
 11 48:22-25; 49:21-50:12]

12 Aristocrat’s counsel interrupted questioning to insist that IGT’s counsel ask particular  
 13 questions preferred by Aristocrat:

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 15 Q. Who would be the second most knowledgeable person at Aristocrat relating to  
 16 that topic?

17 A. I don’t know.

18 MR. BLANCH: Jeff, you might also just want to ask the general question when  
 19 Aristocrat first learned of this issue, but, in any event, that’s your call.

20 [Id. at 9:12-17; see also pp. 103-104 (“objecting” to questions about U.S. sales of Aristocrat  
 21 products, providing extensive commentary and directing IGT’s counsel to show the witness  
 22 documents, instead of asking the pending question)]

23 Moreover, Aristocrat’s counsel made objections that seemed simply directed at disrupting  
 24 the proceeding. For example, despite the fact that “Topic No. 1” related to abandonment of the  
 25 application and knowledge of that by Aristocrat and its agents, the attorney repeatedly objected to  
 26 questions directed simply at identifying who was at Aristocrat during the time of abandonment as  
 27 purportedly “[b]eyond the scope of the Rule 30(b)(6) deposition.” [Id. at 22:7-14] Similarly,  
 28 when IGT asked who was most knowledgeable person regarding conception and reduction to  
 practice—which was explicitly Topic 12 of the deposition—Aristocrat’s counsel objected that it

1 was “[b]eyond the scope of the Rule 30(b)(6) deposition.” [*Id.* at 61:24-62:10]

2 Aristocrat’s counsel even made what seem to be prophylactic objections proffered before  
3 there were any pending questions, solely to disrupt the deposition. [*Id.* at 46:19] The objections  
4 also went to “potential” and not actual issues. [*Id.* at 115:15-16, 118:23-24]

5 **E. At The 30(b)(6) Deposition Regarding Intent, The Witness Was Unprepared**  
6 **To Testify**

7 Aristocrat’s 30(b)(6) designee, Mr. Kieran Power, was made available to testify on behalf  
8 of Aristocrat on each of 14 topics noticed by IGT. [Ramsey Decl., Exs. G, H] Aristocrat’s  
9 witness testified that he was familiar with the deposition topics set forth in the 30(b)(6) deposition  
10 notices to the Aristocrat entities and that he was present to testify as a witness for them on those  
11 topics. [*Id.*, Ex. A at 31:2-33:25] However, he was entirely unprepared to do so.

12 **Topic 1:** For example, the witness was unprepared on Topic No. 1, regarding Aristocrat’s  
13 abandonment of the application.

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35:1-38:16; 128:1-8]

22 **Topic 2:** The witness was unprepared as to Topic 2, concerning an unsigned inventorship

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**Topic 3:** The witness was similarly unprepared with respect to Topic No. 3, concerning delay in filing a petition to revive and Aristocrat's knowledge on the subject. The witness refused to provide any information at all:

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**Topic 10:** The witness was unprepared to testify as to Topic 10, concerning the introduction and commercial success or failure in the U.S. of Aristocrat's games practicing the

1 asserted patents and associated efforts to obtain regulatory approval. IGT asked what was the

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8 **Topic 11:** Topic 11 expressly asked for information about assignments, licenses or  
9 covenants not to sue regarding the asserted patents. The witness testified that he had not

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17 **Remaining Topics:** It is likely that the witness was similarly unprepared on the other  
18 noticed topics. However, as discussed below, Aristocrat terminated the deposition early and  
19 explicitly denied IGT the opportunity to further explore the foregoing or any other topics. [*Id.* at  
20 157:11-159:22]

21 **F. Aristocrat's Counsel Interfered With The Deposition By Unilaterally**  
22 **Terminating The Deposition And Removing The Witness Prematurely**

23 At approximately 2:16 p.m., shortly after the lunch break as IGT was continuing its  
24 questioning, counsel for Aristocrat suddenly and unilaterally terminated the deposition. IGT's  
25 counsel stated that there were further questions that he intended to ask, but Aristocrat's counsel  
26 nonetheless repeated "The depo is over" and left the room with the witness. [*Id.* at 155:22-  
27 159:22] However, Aristocrat's counsel refused to discuss the issue at all on the record. [*Id.* at  
28 158:10-159:9]

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1 Counsel for IGT met with Aristocrat's counsel in the lobby of the law firm, requesting  
 2 that he return with the witness to continue the deposition. Counsel for IGT made it clear that he  
 3 wished to walk through the noticed topics, ask the witness about his preparation on the topics and  
 4 what he learned from the sources of his preparation. Nonetheless, Aristocrat's counsel refused to  
 5 continue the deposition or even return to the conference room, only about 30 feet away, to place  
 6 Aristocrat's position on the record. [*Id.* at 158:10-159:22]

7 Shedding light on this event is the fact that during a subsequent meet and confer,  
 8 Aristocrat's counsel told IGT's counsel that the deposition strategy was to set up a motion for a  
 9 protective order. This confirmed statements to the same effect made by Mr. Blanch during a  
 10 break in the deposition. [Weisenberg Decl., ¶¶2-5]

### 11 **III. ARGUMENT**

#### 12 **A. Aristocrat's Failure To Provide An Adequately Prepared 30(b)(6) Witness** 13 **Violated The Rules Of Civil Procedure**

14 Under Rule 30(b)(6), when a party seeking to depose a corporation properly notices the  
 15 subject matter of the proposed deposition, the corporation must produce a witness familiar with  
 16 that subject. *See* Fed. R. Civ. P. 30(b)(6); James Wm. Moore et al., *Moore's Federal Practice*, ¶  
 17 30.25[3] (3d ed. 1998). To satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty  
 18 to make available "such number of persons as will" be able "to give complete, knowledgeable  
 19 and binding answers" on its behalf. *Securities & Exchange Comm'n v. Morelli*, 143 F.R.D. 42,  
 20 45 (S.D.N.Y. 1992) (quotations omitted); *see* *Moore's Federal Practice*, at ¶30.25. It has been  
 21 observed that "a corporation has a duty to educate its witnesses so they are prepared to fully  
 22 answer the questions posed at the deposition." *Bowoto v. ChevronTexaco Corp.*, 2006 U.S. Dist.  
 23 LEXIS 36040, \*4 (N.D. Cal. 2006). Accordingly, it is a violation of the foregoing requirement  
 24 where a corporate deponent fails to designate a knowledgeable witness on the noticed topics. *See*  
 25 *e.g. FDIC v. Butcher* 116 F.R.D. 196, 201 (E.D. Tenn. 1986).

26 Aristocrat failed entirely to provide a witness capable of providing "complete,  
 27 knowledgeable and binding answers" during the April 27, 2007 deposition. The witness did little  
 28 to no preparation on the noticed topics, did not review relevant documents or discuss noticed

1 topics with those most knowledgeable. Consequently, the witness was wholly unprepared.

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5 know who was at Aristocrat during that time. Aristocrat's tactic of designating such a witness is  
 6 improper. *See FDIC*, 116 F.R.D. at 201 (designation of a junior employee with no knowledge of  
 7 the facts was inappropriate). With tacit approval by Aristocrat's counsel, the witness was evasive  
 8 denying that he knew the relationship between the two Plaintiffs that he appeared on behalf of.  
 9 Only after follow-up did he admit one was a subsidiary of the other. [*Id.* at 31:24-33:2] The  
 10 witness admitted not checking the database in preparation for the deposition although noting it  
 11 contained the most relevant information on the issue of abandonment. [*Id.* at 48:18-49:20]

12 This is particularly egregious given that last fall Aristocrat asserted the necessity of  
 13 discovery concerning its intent to avoid an early trial on inequitable conduct. Yet now in its  
 14 30(b)(6) deposition, Aristocrat refuses to provide any discovery in this regard, instead relying  
 15 solely on the contents of the prosecution history. For example when asked: "[w]hy did it take  
 16 two-and-a-half years to file a petition to revive the '215 patent application," Aristocrat's counsel  
 17 interposed a privilege objection and the witness would only answer "based on what's in the file  
 18 wrapper." [*Id.* at 6:11-20] Aristocrat's failure to prepare its witness on the relevant topics  
 19 amounts to a complete denial of any meaningful discovery to IGT.

20 **B. Aristocrat's Improper Assertion Of The Attorney Client Privilege And Work**  
 21 **Product Doctrine Violated The Rules Of Civil Procedure.**

22 Federal Rule of Civil Procedure 30 governs the deposition process. During a deposition, a  
 23 defending attorney may object from time to time based on relevance, form of the question, etc.  
 24 but the deponent must answer the question, as no judge is present to rule on the objection. *See*  
 25 *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398,  
 26 420-422 (D. Md. 2005). Counsel should not instruct the deponent to not answer except in very  
 27 limited circumstances because of the disruption it causes. *Id.*; Fed. R. Civ. P. 30 advisory  
 28 committee notes ("Directions to a deponent not to answer a question can be even more disruptive

1 than objections.”). Rule 30(d)(1) explicitly states: “Any objection during a deposition must be  
 2 stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a  
 3 deponent not to answer only when necessary to preserve a privilege, to enforce a limitation  
 4 directed by the court, or to present a motion under Rule 30(d)(4).”

5 During the April 27, 2007 deposition, Aristocrat’s counsel made a mockery of these rules.  
 6 repeatedly instructing the witness not to answer based on “attorney client privilege” and “work  
 7 product” objections when there was clearly no basis to do so, or based on wholly concocted  
 8 objections, or upon no basis at all.<sup>2</sup> This is all a violation of Rule 30.

9 **C. Aristocrat’s Unilateral Termination Of The Deposition Violated The Rules Of**  
 10 **Civil Procedure.**

11 IGT had the right to depose Aristocrat’s witness on the noticed topics for at least the full  
 12 day of testimony requested in the deposition notice. Aristocrat’s counsel’s unilateral termination  
 13 of the deposition and removal of the witness was completely inappropriate. Courts have found  
 14 that refusal to answer deposition questions and unilateral termination of a deposition is an abuse  
 15 of discovery. *See e.g. Moses v. Sterling Commerce*, 2003 U.S. Dist. LEXIS 13390, \*7-8 (S.D.  
 16 Ohio 2003) (dismissing case as a sanction for repeated discovery abuse, including refusal to  
 17 answer deposition questions and terminating deposition prematurely); *Hearst/ABC-Viacom*  
 18 *Entertainment Servs. v. Goodway Mktg., Inc.*, 145 F.R.D. 59, 62 (E.D. Pa. 1992) (counsel “went  
 19 so far as to arrogate to himself the right to terminate the examination in a unilateral fashion  
 20 without consideration of the applicable legal authority . . . This tactic contravenes the  
 21 requirement that an application to terminate must be made to the court.”)

22 There was absolutely no valid basis for Aristocrat to deprive IGT of discovery in this way,  
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24 <sup>2</sup> *See e.g. Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (privilege “does not protect  
 25 disclosure of the underlying facts by those who communicated with the attorney”); *Neuberger*  
 26 *Berman Real Estate Income Fund, Inc.*, 230 F.R.D. at 423 (finding that mere “mental  
 27 impressions” of an attorney “does not substantiate the assertion of either attorney-client privilege  
 28 or work-product doctrine.”); *Status Time Corp. v. Sharp Electronics Corp.*, 95 F.R.D. 27, 28-29,  
 32-33 (S.D.N.Y. 1982) (work product doctrine does not extend to patent prosecution). Further  
 Aristocrat has waived any attorney client privilege, as set forth more fully in IGT’s motion to  
 compel further 30(b)(6) testimony, filed concurrently herewith, and incorporated by reference.

1 and such conduct violates the Rules of Civil Procedure.

2 **D. Aristocrat Should Be Compelled To Produce An Adequately Prepared**  
 3 **30(b)(6) Witness For Deposition In Portland Oregon**

4 Where a 30(b)(6) witness is inadequately prepared, fails to answer questions on the  
 5 noticed topics, and where counsel improperly invokes the attorney client privilege and work  
 6 product doctrine and terminates the deposition, the Court may order that the corporate deponent  
 7 provide a more adequately prepared witness for further deposition on the noticed topics and on  
 8 the matters with respect to which privilege was improperly asserted. Rule 30(d)(3) provides that  
 9 “[i]f the court finds that any impediment, delay, or other conduct has frustrated the fair  
 10 examination of the deponent, it may impose upon the persons responsible an appropriate sanction  
 11 . . .” See Fed. R. Civ. P. 30(d)(3); Fed. R. Civ. P. 37(a)(2)(B), (a)(3) (authority to compel  
 12 testimony where deponent fails to provide or provides only an evasive or incomplete deposition  
 13 answer); *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D. N.C. 1989);  
 14 *Neuberger Berman Real Estate Income Fund, Inc.*, 230 F.R.D. at 424 (ordering reproduction of  
 15 witnesses to answer questions to which privilege improperly asserted during prior deposition);  
 16 *Hearst/ABC-Viacom Entertainment Services*, 145 F.R.D. at 63-64 (same; where counsel  
 17 unilaterally terminated deposition).

18 Given Aristocrat’s complete failure to provide an adequately prepared witness on any of  
 19 the noticed topics, it should be ordered to make available a witness with full and complete  
 20 knowledge of the topics. As a sanction, the Court should further order that the continued  
 21 deposition take place in Portland, Oregon, where IGT’s lead counsel is located, with strict  
 22 instructions to Aristocrat’s counsel not to disrupt the proceedings as described herein.

23 **E. As A Sanction, Aristocrat Should—At The Very Least—Be Required To Pay**  
 24 **For All Costs And Fees Associated With The Aborted Deposition And IGT’s**  
 25 **Motion To Compel.**

26 Monetary sanctions are available for impeding, delaying or frustrating the fair  
 27 examination of the deponent. See Fed. R. Civ. P. 30(d)(3). Similarly, Rule 37(a) provides that if  
 28 a party is successful on a motion to compel compliance with Rule 30(b)(6), monetary sanctions

1 are available. *See* Fed. R. Civ. P. 37(a)(4)(A).<sup>3</sup> Further, pursuant to its “inherent powers” the  
 2 Court may award monetary sanctions against a party or counsel where the party “demonstrates  
 3 bad faith by delaying or disrupting the litigation.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th  
 4 Cir. 2006).

5 Aristocrat did not conduct any preparation of its 30(b)(6) witness, instead providing an  
 6 employee who was unable to testify in any significant way as to any of the noticed topics. This,  
 7 in itself, is contrary to the purpose of Rule 30(b)(6) warranting sanctions. Counsel for Aristocrat  
 8 repeatedly interfered with the testimony of the witness. He repeatedly instructed the witness not  
 9 to answer, based on wholly concocted objections not recognized by the Federal Rules or without  
 10 even stating any objection at all. He improperly invoked the attorney client privilege and work  
 11 product doctrine constantly throughout the short-lived deposition and instructed the witness not to  
 12 answer, even though the questions elicited only unprivileged facts. This was abusive. He  
 13 interrupted questioning, demanding that counsel ask the questions and review the documents that  
 14 Aristocrat wanted the witness to testify about, and otherwise interposed objections simply to  
 15 obstruct testimony. Finally, Aristocrat’s counsel unilaterally removed the witness from the  
 16 deposition with no basis to do so.

17 Each of these reasons independently supports an award of sanctions. Aristocrat’s conduct  
 18 was carried out in bad faith, and was not “substantially justified.” Imposition of monetary  
 19 sanctions is just, as it would further the policies of Rule 30(b)(6) and the orderly administration of  
 20 discovery. *See Humphreys v. Regents of the Univ. of Cal.*, 2006 U.S. Dist. LEXIS 20151, \*7-8  
 21 (N.D. Cal. 2006) (where counsel unjustified in instructing witness not to answer questions, fees  
 22 and costs associated with motion to compel and deposition expenses awarded as a sanction);  
 23 *Neuberger Berman Real Estate Income Fund, Inc.*, 230 F.R.D. at 424 (granting costs and fees for  
 24 motion to compel where counsel for deponent improperly asserted privilege at deposition);  
 25 *Hearst/ABC-Viacom Entertainment Services*, 145 F.R.D. at 63-64 (defendants and counsel

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26 <sup>3</sup> The only exceptions to Rule 37 sanctions are where the party opposing the motion was  
 27 “substantially justified” in their actions or where such an award would be “unjust.” Neither  
 28 exception applies here.

ordered to pay reasonable expenses, including attorneys' fees, for motion to compel made after counsel unilaterally terminated deposition).

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**F. Terminating Sanctions Are Appropriate**

One available remedy for egregious discovery violations is the termination of a plaintiff's case. Fed. R. Civ. P. 37(b)(2); *G-K Properties v. Redevelopment Agency of the City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978). ("Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance."). Rule 37(d) provides that where a 30(b)(6) witness fails to appear at deposition, after being served with proper notice, the court may dismiss the action as a sanction. Fed. R. Civ. P. 37(d), 37(b)(2). Further, dismissal is an available sanction pursuant to the court's "inherent power" when "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings" and has abused the discovery process in bad faith. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348-349 (9th Cir. 1995).

The remedies discussed above are a minimum sanction. Aristocrat's conduct during the 30(b)(6) deposition warrants termination of Aristocrat's case. Aristocrat put the topic of its "intention" at issue when it told the PTO that its delay was purportedly "unintentional." When IGT wished to resolve this issue in an early trial, Aristocrat complained that substantial discovery on its "intent" was required. Yet, when Aristocrat is deposed as to its corporate knowledge and contentions, it is not an understatement to say it provided no answers at all. Rather, its attorney

1 simply made up objections, misused purported “privileges” at every turn, and repeatedly  
 2 instructed the witness not to answer at all. Quite literally, opening the transcript and reading any  
 3 three, four or five pages will reveal such improper tactics, and IGT invites the Court to do so.  
 4 [See Ramsey Decl., Ex. A]

5 Aristocrat’s bad faith obstruction of all discovery on a central issue, which it has conceded  
 6 IGT is entitled to discovery on constitutes precisely the kind of conduct supporting terminating  
 7 sanctions. *See Anheuser-Busch, Inc.*, 69 F.3d at 348-349 (terminating sanctions warranted where  
 8 bad faith misconduct “threatens to interfere with the rightful decision of the case.”). Indeed, IGT  
 9 has been and will be substantially prejudiced by Aristocrat’s obstruction and refusal to provide  
 10 details regarding its knowledge and intent regarding its abandoned patent application and petition  
 11 to revive. IGT respectfully requests that this issue be referred to the District Court, for  
 12 consideration of the issue of terminating sanctions. *See e.g. Moses*, 2003 U.S. Dist. LEXIS 13390  
 13 at \*7-8 (dismissing case as a sanction for egregious discovery abuse, including refusal to answer  
 14 deposition questions and terminating deposition prematurely).

#### 15 **IV. CONCLUSION**

16 Based on the foregoing, IGT respectfully requests that the Court order the further  
 17 deposition of Aristocrat and provide the additional sanctions requested herein.

18  
 19 Dated this 12th day of May, 2007

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 14, 2007 a true copy of the **MOTION FOR SANCTIONS** was served by electronic mail to the following:

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